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No. 71-845

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1971

MARTIN OIL SERVICE, INC.,
Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MAYER, BROWN & PLATT

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON
231 South LaSalle Street
Chicago, Illinois 60604

December 28, 1971

SORG/CHICAGO, U.S.A.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Martin Oil Service, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this proceeding on September 30, 1971.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 49 Ill. 2d 260, 273 N.E.2d 823; it appears in the Appendix at A. 1-10, *infra*. The Circuit Court of Cook County, Illinois entered no opinion.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since the construction of a statute of the United States is in issue.

STATUTES INVOLVED

The statutory provisions involved are 26 U.S.C. §§ 4081(a), 4082(c), 4083, 6420(a) and 6421. These provisions read as follows:

Sec. 4081(a)

"In general.—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Sec. 4082(c)

"Certain uses defined as sales.—If a producer or importer uses . . . gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this chapter be considered a sale."

Sec. 4083

"Exemption of sales to producer.—Under regulations prescribed by the Secretary or his delegate the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline."

Sec. 6420(a)

"Gasoline.—Except as provided in subsection (h), if gasoline is used on a farm for farming purposes, the

Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(1) the number of gallons so used, by

"(2) the rate of tax on gasoline under section 4081 which applied on the date he purchased such gasoline."

Sec. 6421

"(a) Nonhighway uses.—Except as provided in subsection (i), if gasoline is used otherwise than as a fuel in a highway vehicle (1) which (at the time of such use) is registered, or is required to be registered, for highway use under the laws of any State or foreign country, or (2) which, in the case of a highway vehicle owned by the United States, is used on the highway, the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon. . . .

"(b) Local transit systems.—

"(1) Allowance.—Except as provided in subsection (i), if gasoline is used during any calendar quarter in vehicles while engaged in furnishing scheduled common carrier public passenger land transportation service along regular routes, the Secretary or his delegate shall, subject to the provisions of paragraph (2), pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(A) 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon, by

"(B) the percentage which the ultimate purchaser's commuter fare revenue derived from such scheduled service during such quarter was of his

total passenger fare revenue derived from such scheduled service during such quarter.* * *"

QUESTION PRESENTED

The question presented is whether, in holding that the legal incidence of the Federal gasoline tax is not on the retail consumer, the Illinois Supreme Court has misconstrued the Federal statute imposing that tax.

STATEMENT OF THE CASE

Petitioner Martin Oil Service, Inc. ("Martin") is a distributor of gasoline in Illinois, through two wholesale and 47 retail outlets.

Since 1948, Martin has been licensed by the United States Treasury Department as a "producer" of gasoline,* pursuant to 26 U.S.C. § 4081 and regulations promulgated thereunder. Under that license, Martin is required to remit to the Internal Revenue Service ("I.R.S.") a Federal gasoline tax upon each gallon of gasoline sold by it at retail. (26 U.S.C. § 4081(a).) Continuously since 1948, Martin has collected the Federal gasoline tax from its retail customers and remitted that tax on a monthly basis to the I.R.S.

During the same period, Martin was also liable for the Illinois retailers' occupation tax on all its retail sales. Accordingly, Martin has remitted to the State of Illinois at the applicable rate the retailers' occupation tax which arose from its retail sales of gasoline.

From 1935 to 1962, the Regulations of the Department of Revenue of the State of Illinois provided that a retailer of gasoline who was also a producer thereof could deduct from "gross receipts" (the base upon which its retailers' occu-

*Section 4082(a) defines producer to include a wholesale distributor.

pation tax liability is computed) an amount equal to the Federal gasoline tax that the retailer remitted to the Federal Government.* Thus, from 1948 through 1962, Martin excluded the amount of the Federal gasoline tax from the base on which it computed its Illinois retailers' occupation tax liability.

Then, on January 10, 1962, without any change of the Federal or Illinois statutes and without any judicial determination, the Department of Revenue reversed its administrative construction so as to prohibit the deduction of Federal gasoline taxes from gross receipts in computing the retailers' occupation tax liability of a retailer which, as a producer, collected Federal gasoline taxes from its retail customers.

Martin thereafter ceased deducting the Federal gasoline tax in determining its "gross receipts" for retailers' occupation tax purposes, paid the State tax as so computed into a protest fund, and filed a claim for credit with the State Department of Revenue. On disallowance of the claim, Martin sued for review of the administrative determination

*From 1935 to 1962, the Illinois Regulations distinguished between retail and wholesale sales by sellers holding a Federal producer's license. See e.g. Article 3(4)f of the Illinois Retailers' Occupation Tax Rules and Regulations (1960). When wholesale sales of gasoline were made by a producer, gross receipts from the subsequent retail sales were held to include the Federal gasoline tax. The Regulations did not articulate the reasons behind this distinction, but the logical rationale is that the Illinois Department of Revenue concluded that the legal incidence of the Federal gasoline tax was not on the producer who sold the gasoline, but on the purchaser from such producer, so that on retail sales by producers the legal incidence was on the consumer and on wholesale sales the legal incidence was on the retailer.

in the Circuit Court of Cook County. The Circuit Court sustained the determination of the Department of Revenue, and the Supreme Court of Illinois affirmed.

THE FEDERAL QUESTION

Under established Illinois law, a retailer, in computing his retailers' occupation tax liability, is entitled to exclude from his "gross receipts" the taxes he collects from his retail consumer, when the legal incidence of the tax so collected is on the consumer.* Thus, as appears from the opinion of the Supreme Court of Illinois (A. 2), Martin's principal contention in this case was:

> "... that the legal incidence of the Federal gasoline tax is on the consumer-purchaser. If the legal incidence is indeed on the consumer-purchaser, the Federal tax is not to be included in 'gross receipts' in the computation of the retailers' occupation tax. ..."

The legal incidence of a Federal tax is clearly a Federal question. In holding that "the incidence rests on the producer," not the consumer (A. 3), the Illinois Court referred to various provisions of the Internal Revenue Code as well as to Federal legislative history, subjects which had been treated in the Briefs submitted to it. The determination of the question of Federal law was decisive to the question of state law,—*i.e.* whether or not the Federal tax should be included in the gross receipts taxed under the Illinois Retailers' Occupation Tax Act.

Under such circumstances the Federal question is reviewable by this Court. *Standard Oil Company* v. *Johnson*, 316

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*See *American Oil Co.* v. *Mahin*, 49 Ill. 2d 199, 273 N.E.2d 818 (1971), holding that a gasoline retailer may deduct from his retailers' occupation tax base the amount of Illinois motor fuel tax he has collected from his consumer.

U.S. 481, 483 (1942); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958); *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946).* "[W]here the non-federal ground is so interwoven with the other as not to be an independent matter . . ." the jurisdiction of the court "is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917). This principle has been recognized by leading commentators (Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 99, pp. 180-181 (Wolfson and Kurland Ed., 1951):

> "Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute, interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. If this were not the rule, many interpretations of federal law by state courts would not be reviewable by the Supreme Court. . . ."

And, of course, when the highest state court concludes that a Federal question is before it and decides the question, as it did here, the issue is appropriate for presentation to this Court. *Moragne* v. *States Marine Lines*, 398 U.S. 375, 379 n. (1970); *Raley* v. *Ohid*, 360 U.S. 423, 436 (1959);

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*In the *Richfield* case, as described in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 99, p. 181 n., (Wolfson and Kurland Ed., 1951), "[t]he appellee contended that the United States Supreme Court did not have jurisdiction of the appeal, because the statute in question provided an exemption from taxation of 'The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States of America * * *.' It was the appellee's position that, under this statute, whether the Constitution forbade the taxation of the gross receipt in question was a state question. The Court, by accepting jurisdiction, implicitly rejected this contention."

WHYY v. Glassboro, 393 U.S. 117, 119 (1968). It is an "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1914); Robertson & Kirkham, § 83 (Wolfson and Kurland Ed., 1951); Stern and Gressman, *Supreme Court Practice*, § 3.28.(4th Ed., 1969).

REASONS FOR GRANTING THE WRIT

A. The Issue Presented Involves Taxes In At Least 21 States.

A decision by this Court as to the incidence of the Federal tax on gasoline, which is obviously a Federal question, will be determinative not only of the instant case, but will authoritatively settle identical issues created under tax statutes in at least 21 states (A. 11-14) and in thousands of municipalities, including such major cities as Chicago, New York and Los Angeles.* That is, a decision here will determine whether or not a variety of state and local sales, use, occupation, gross receipts and license taxes that are measured by "gross receipts" or "gross proceeds" may be imposed on the amount of the Federal gasoline tax, collected by retailers from retail customers.

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*Appendix B, attached hereto, lists 13 states which impose taxes measured by gross receipts, and which do not exclude the Federal gasoline tax from the state tax base by statute. Appendix C, following, lists 14 states (including six appearing in Appendix B) which permit local governmental units to impose taxes measured by gross receipts, and which do not statutorily exclude the Federal gasoline tax from the local tax base.

The highest courts of six states have been faced with the issue at hand, and are evenly divided. The Illinois Supreme Court below admitted that the decision of the Supreme Court of Pennsylvania in *Tax Review Board* v. *Esso Standard Division*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. den.*, 389 U.S. 824 (1967) (Philadelphia Mercantile Tax, a gross receipts tax), took a contrary position by its holding "that the legal incidence of the tax is on the purchaser-consumer" (A. 3). The Supreme Courts of Michigan and North Dakota have also held that the amount of the Federal tax is not to be included in the gross receipts realized by the seller in the computation of state taxes. *Standard Oil Company* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937) (Michigan sales tax, measured by gross proceeds); *Standard Oil Company of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941) (North Dakota sales tax, measured by gross receipts). See also to the same effect *Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N.Y.S.2d 544 (1939) (New York City sales tax).*

On the other hand, the Supreme Courts of Georgia and Indiana have reached the same conclusion as the Illinois court. *Sun Oil Co.* v. *Gross Income Tax Division*, 238 Ind. 111, 149 N.E.2d 115 (1958) (Indiana gross income tax); *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224, *affirmed*, 226 Ga. 883, 178 S.E.2d 173 (1970) (Georgia sales and use taxes, measured by "sales price").

The Federal tax law has the same meaning throughout the nation. It is unfair and unrealistic that conflicting in-

*Other portions of this decision were reviewed and affirmed by the New York Court of Appeals and this Court. 281 N.Y. 647, 22 N.E.2d 480, and 309 U.S. 414 (1940).

terpretations of Federal law should subject persons in some states to higher taxes than those in other states. When the highest courts of a number of states differ as to what a Federal statute means, only this Court can provide a binding and uniform resolution of the question.

B. The Legal Incidence Of The Federal Gasoline Tax Is On The Consumer.

The operative words of the Federal statute (26 U.S.C. § 4081(a)) are:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

The Illinois court recognized that, though "the duty to remit the tax is on the producer," the "ultimate economic burden rests on the purchaser-consumer" (A. 4). Thus, as an *economic* matter, the producer is only a collector, and that incidence falls on the consumer. Absent a clear showing to the contrary, the *legal* incidence should be treated no differently. Indeed, a strong burden should rest on a party advocating that the law be read contrary to practical reality. Here, while the question of legal incidence is not made clear by the statute, the impact of the legislative history and companion statutory provisions indicates that the legal (as well as economic) incidence falls on the consumer.

The words of Section 4081(a)—the tax is "imposed on gasoline sold by the producer"—do not say whether the legal incidence of the tax is *on* the producer or consumer. And the fact that the Treasury Regulations (§ 48.4081-1(c)) require the producer to *remit* the tax does little to clarify the situation. This, of course, does not mean that the tax

is legally *imposed* upon such remitting producer, but merely provides an administratively convenient method of collecting the tax. Since there are far fewer producers than retailers or consumers, the method of collection adopted greatly simplifies the enforcement burden carried by the I.R.S.* In this regard, it is significant that Congress chose to collect the tax not from the first producer of gasoline, but from the producer closest to the consumer in the distributive chain who can be taxed consistently with the administrative policy of convenience just expressed. That is, the Federal gasoline tax is not collected when a sale is made from one producer to another, but only when it passes from the last producer's control (26 U.S.C. § 4083).

Congress has manifested its intent to legally impose the Federal gasoline tax upon the consumer by providing, in certain instances, for refunding Federal gasoline taxes to the ultimate consumer even though they were originally remitted by a producer. For example, the tax on gasoline used on a farm for farming purposes is refunded directly to the consumer of that gasoline (26 U.S.C. § 6420(a)). Similarly, the tax is refunded to the ultimate consumer at the rate of 50% when the gasoline is used for off-highway purposes other than farming (26 U.S.C. § 6421(a)), or by local transit systems (26 U.S.C. § 6421(b)). Thus, even

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*The device of funnelling tax remittances through administratively convenient conduits is a common one when the class of taxpayers upon whom the tax is legally imposed is very numerous. Indeed, this Court has characterized the use of a distributor as a tax collector as "a familiar and sanctioned device". *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 338 (1944). See also *Monamotor Oil Co.* v. *Johnson*, 292 U.S. 86, 93 (1934); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62, 68 (1939).

though the tax is collected by the Federal government from the producer, Congress provided that it should be refunded directly to the consumer in these instances.

Martin is unaware of any precedent for concluding that Congress intended to provide a refund of tax to persons upon whom the legal incidence did not rest. The court below characterized these payments as "not refunds in a technical sense," but merely "allowances . . . based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer" (A. 6). But that is to ascribe to Congress an intent for which there is no precedent. It also differentiates artificially between economic burden and legal incidence.

Other statutory provisions also demonstrate that the tax was meant to be imposed only on the user of the gasoline. For example, Congress specifically provided that when a producer *uses* gasoline produced or imported by him, such use should be considered a taxable sale (26 U.S.C. § 4082(c)). Conversely, in Revenue Ruling 64-211, 1964-2 Cum. Bull. 421, the I.R.S. ruled that no tax is due when a consignee of the producer loses the gasoline through evaporation or spillage so that the gasoline never reaches the ultimate consumer. The tax is thus imposed when gasoline is *used*, but not if it is not used.

These statutory provisions taken together lend much weight to the conclusion that, whatever the collection procedure utilized, the Federal gasoline tax rests on the consumer rather than the producer.*

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*In the court below, respondent relied upon *Lash's Products Co.* v. *United States*, 287 U.S. 175 (1929), which related to the Federal tax on soft drinks. The statutory tax structure there involved did not contain the provisions referred to in the text, such as the direct refunds to certain consumer purchasers, and thus is distinguishable.

The legislative history of the gasoline tax supports this conclusion. The present gasoline tax is derived from the Revenue Act of 1932, Act of June 6, 1932, § 617, 47 Stat. 169, 266-67. Incident to the enactment of that Act, Senator Walsh, a member of the Committee on Finance, introduced a Floor amendment providing for a number of excise taxes, one of which was the gasoline tax. His comments on that amendment (S. Rep. No. 665, 72nd Cong., 1st Sess. 2 (1932), suggest that from the outset Congress, in providing for collection of the Federal gasoline tax from a limited number of producers, was not fixing its legal incidence on them, but was merely considering facility of collection.

When the refund provisions mentioned above were enacted by the Acts of April 2, 1956, § 1, 70 Stat. 87, and June 29, 1956, § 208(c), 70 Stat. 374, 394, the ultimate legal impact of the tax was also indicated by H. R. Rep. No. 1684, 84th Cong., 2d Sess. 1, 2 (1956). In that Report, Congress' purpose in enacting the refund provisions was described as an effort to diminish the "costs which the farmer must pay." "One of the costs which the farmer must meet", the report stated, "is the Federal . . . tax presently imposed on the gasoline he uses on his farm." See also S. Rep. No. 1609, 84th Cong., 2d Sess. (1956).

Moreover, when revising the statute in 1965, the House Ways and Means Committee reported that the Excise Tax Reduction Act of 1965, 79 Stat. 136, amending the Internal Revenue Code of 1954, was designed to "leave a tax system in which [certain] . . . excise taxes . . . are levied on the benefit principle." "Under this principle," the Committee reported (H. R. Rep. No. 433, 89th Cong., 1st Sess. 11 (1965)):

> "*those who benefit* from particular Government services help to pay the cost of the services by paying charges (in the form of excises) which to some extent

measure their *use* of the services. Included in this category are such taxes as those on *gasoline*, tires, and tubes, and other revenues allocated to the highway trust fund." (Emphasis added.)

In the same report, at pp. 14-15, the Committee continued:

> "Taxes such as those on gasoline . . . are *user taxes* . . . a tax on gasoline taxes users of the highways in rough proportion to their use of the service." (Emphasis added.)

Similarly, in his message to Congress of May 17, 1965, President Johnson stated that "reform of the excise tax structure will leave . . . excises on alcoholic beverages, tobacco, *gasoline*, tires, trucks, air transportation (and a few other *user-charges* and special excises). . . ." (Emphasis added.) H. R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).

The Court below relied on the statement in a 1961 Senate Committee Report that the Federal gasoline tax "is imposed on the producer, importer or wholesale distributor" (A. 5; S. Rep. No. 367, 87th Cong., 1st Sess. 22, 23 (1961)). But, as the opinion recognized (A. 6), this statement was made in connection with a provision which was deleted in conference and not enacted into law. It is thus entitled to little weight in determining the meaning of statutory language enacted many years before. Moreover, in this admittedly ambiguous situation, the term "imposed" could well have referred only to the fact that the manufacturer is required to *remit* the tax. Such a construction seems probable when it is recognized that the provision being supported by the Senate Committee dealt with refunds *to*

retailers for evaporation, not to manufacturers, who remitted the tax.

For the above reasons Martin believes the Supreme Court of Pennsylvania was correct in *Tax Review Board* v. *Esso Standard Division*, when it concluded (227 A.2d at 658-659):

> "However, it is our considered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is 'sold,' and the particular levy is a sales tax pure and simple. Further, the nature, *the size of the tax in relation to the wholesale price of the product*, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.
>
> "*The revenue collected as a result of the tax does not go into the general treasury.* Instead, it is placed in a special fund and is used solely to defray the cost of the federal highway system. *It was designed to charge the motorists, who use the highways, with the cost thereof.* It has been recognized and characterized by both the President and Congress of the United States as a 'user tax.' Moreover, this conclusion is fortified by Section 6420(a) of the code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes." (Emphasis added.)

This Court denied a Petition for Certiorari in the *Esso* case. But unless this Court grants the instant Petition, the Pennsylvania interpretation will be followed in some states and the Illinois interpretation in others — and the legal incidence of a single Federal statute will be applied non-

uniformly under similar tax statutes in the several states. Martin, therefore, submits that the decision of the Illinois Supreme Court should be reviewed and reversed by this Court.

Respectfully submitted,

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600
Counsel for Petitioner

MAYER, BROWN & PLATT
Of Counsel

APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS

No. 43241

Decided September 30, 1971

MR. JUSTICE WARD delivered the opinion of the court:

Martin Oil Service, Inc., the plaintiff, is an Illinois corporation engaged in the sale, wholesale and retail, of petroleum products. It filed claims for credit for the months of March, April, May, June and July of 1964 for its various sales outlets in the State of Illinois, under the Retailers' Occupation Tax Act, the Municipal Retailers' Occupation Tax Act, and the County Retailers' Occupation Tax Act (hereafter referred to as the retailers' occupation tax) for the amount of tax paid under a rule of the Department of Revenue which required sellers of gasoline to include the Federal gasoline tax in the base upon which the retailers' occupation tax is computed. The Department denied the claims, and the plaintiff sought administrative review in the circuit court of Cook County. The court affirmed the denial by the Department of Revenue, and this appeal was brought. We took jurisdiction on direct appeal under our then governing Rule 302(a) because the revenue is involved.

Martin operates two wholesale and 43 retail outlets in Illinois. In 1948, it was licensed by the United States as a "producer" of gasoline. Under that license it is required to remit to the Federal government a Federal gasoline tax on each gallon it sells to a "non-producer." (26 U.S.C. sec. 4081.) Thus, this tax becomes due when Martin sells to a consumer through its retail outlets or when it sells at wholesale to a non-producer retailer. During the period involved

here, Martin, as a retailer in Illinois, was subject to the retailers' occupation tax on its retail sales in this State.

Prior to February 1, 1962, Martin deducted on its retailers' occupation tax returns an amount equal to the Federal gasoline tax that it had remitted to the Federal government on the gasoline it had sold at retail. This was permitted under the then existing regulations of the Illinois Department of Revenue. Although this regulation had been in effect since 1935, on January 10, 1962, the Department amended its regulations to prohibit such a deduction from the gross receipts from retail customers, on which receipts the retailers' occupation tax is based.

Martin undertook to persuade the Department to recall its amendment and while this effort was being made, that is, until April, 1964, Martin itself absorbed the increased retailers' occupation tax on all sales made through its retail outlets. At that time Martin began to pass on the burden of the tax to its consumer-customers at some of its stations. The claims here concern sales at stations where the tax was not passed on to the consumer purchasers.

The operative words of the Federal statute are: "There is hereby imposed on gasoline sold by the producer or importer thereof, or by a producer of gasoline, a tax of four cents a gallon." (26 U.S.C. sec. 4081) A sale from a producer to another licensed producer is exempted from the tax. (26 U.S.C. sec. 4083) It is not disputed that the duty to remit the tax is on the producer.

Martin first contends that the legal incidence of the Federal gasoline tax is on the consumer-purchaser. If the legal incidence is indeed on the consumer-purchaser, the Federal tax is not to be included in "gross receipts" in the computation of the retailers' occupation tax. Ill. Rev. Stat. 1969, ch. 120 pars. 440, 441; *American Oil Co.* v. *Mahin,* Docket 43376.

This question appeared before this court in 1936, when in *People* v. *Werner,* 364 Ill. 594, it was said that the legal incidence of the Federal gasoline tax rested on the producer. Martin, to avoid the force of *Werner,* argues that the legal incidence of the tax was there stipulated by the parties. It is true that *Werner* was decided on a stipulation of facts. We cannot find however, any suggestion that the question of the legal incidence of the tax was part of the stipulation. Rather it seems clear that this court's expression that the legal incidence of the tax rests on the producer was based on its analysis of the Federal statute.

As Martin points out at least one jurisdiction has taken a position opposed to *Werner.* The Supreme Court of Pennsylvania in *Tax Review Board* v. *Esso Standard Division of Humble Oil and Refining Co.* 424 pa. 335, 227 A.2d 657, cert. denied, 389 U.S. 824, 19 L.Ed. 79 held that the legal incidence of the tax is on the purchaser-consumer. Decisions of two other States are read by Martin as supporting its thesis that the tax incidence is on the purchaser-consumer. It was held in *Standard Oil* v. *State* (1937), 283 Mich. 85, 276 N.W. 908, and *Standard Oil Co.* v. *State Tax Commissioner* (1941), 71 N.D. 146, 299 N.W. 447, that on sales from producer retailers to consumers the Federal gasoline and State sales taxes were taxes that were to be simultaneously imposed. Those courts concluded from this that the Federal tax should not be included in the "gross receipts" for the purpose of computing the State tax. Neither case considered the question of on whom the legal incidence of the Federal tax falls. We would observe that other courts have reached the same conclusion this court did in *Werner.* It was held in *Sun Oil Co.* v. *Gross Income Tax Division,* 238 Ind. 111, 149 N.E. 2d 115, by the Supreme Court of Indiana and in *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.,* 121 Ga. App. 454, 174 S.E. 2d 224, aff'd 226 Ga. 883, 178 S.E. 2d 173, by the appellate court of Georgia that the legal

incidence of the Federal tax rests upon the producer. The Supreme Court of Indiana relied importantly on *People* v. *Werner,* in its determination: We consider after reviewing these cases that *Werner* correctly judged that the incidence rests on the producer. The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax. Referring to our decision in *American Oil Co.* v. *Mahin,* No. 43376, where we held that the incidence of the Illinois Motor Fuel Tax is on the consumer, we note that the statute there examined provides that the tax may be recovered from the consumer-purchaser if it has not been collected by the retailer.

It is urged by Martin that certain congressional references to the gasoline tax show it must be considered a tax whose incidence rests on the consumer. Exemplary of these is the President's Message to Congress May 17, 1965, Report of the House Ways and Means Committee on H.B. 8371 89th Congress First Session (1965) at 1070-71, in which President Johnson said: "Reform of the excise tax structure will leave *** excises on alcoholic beverages, tobacco, gasoline, tires, trucks, air transportation (and a few other user charges and special excises) ***." (H.R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).) We consider the references to the tax as a "user tax" were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical nontechnical description of the tax as a "user tax" is explainable, consistently with the legal incidence of the tax being on the producer. The

economic burden of the tax has no relevance to the issue before us. *Fischman & Sons, Inc.* v. *Department of Revenue,* 12 Ill. 2d 253.

So far as the Federal legislative intendment is concerned, it is relevant to notice that a reference of greater and persuasive significance to the incidence of the tax is found in Senate Report No. 367, a report of the Committee of Finance relative to the Federal-Aid Highway Act of 1961. (U.S. Code Congressional and Administrative News, vol. 2, 87th Congress, 1st Session, 1961.) The report, which contains a recommendation by the committee that the gasoline tax be continued at the rate of four cents per gallon, states: "Under present law the Federal tax on gasoline is imposed on the producer, importer or wholesale distributor of the gasoline and is payable shortly after he makes its sale."

Another contention of Martin is that because amendments to the gasoline statute provide that certain consumers of gasoline can secure refunds of the gasoline tax paid, it must have been the legislative intent that the consumer-purchaser would bear the legal incidence of the tax. It is pointed out that in *Chicago Motor Club* v. *Kinney;* 329 Ill. 120, the court said that a tax refund to a person who has not directly or indirectly paid the tax would be unconstitutional, and thus, Martin argues, as certain consumers can secure a refund, the incidence of the tax must be on the consumer-purchaser.

We consider that the argument has only superficial validity when measured against the very convincing evidence of a contrary legislative intention, including the statement of the Committee on Finance that the Federal gasoline tax was imposed "on the producer, importer or wholesale distributor of the gasoline." The amendments upon which Martin relies provide that the purchaser-consumer can obtain payments in full of the Federal gasoline tax, that is, four cents per gallon, if the gasoline has been used on a farm for farming

purposes (26 U.S.C. sec. 6420(a)) and half of the tax payment, that is, two cents a gallon, if the gasoline has been used for other non-highway purposes (26 U.S.C. sec. 6421(a)) or by the local transit systems (26 U.S.C. sec. 6421 (b)). We consider that these payments by the Federal government are not refunds in a technical sense but rather allowances to certain consumer-purchasers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. The gasoline tax proceeds are used to provide Federal finances for highway support. There was an obvious inequity in requiring farmers and others using gasoline for off-highway uses to assume the same burden as consumers whose use of the gasoline required use of the highways. The Congress for this reason provided for these payments. This analysis is supported by a recommendation which appears in Senate Report No. 367 cited above. There the Committee on Finance recommended that retailers of gasoline receive an allowance equal to one percent of the tax paid on gasoline as an allowance for shrinkage or evaporation of gasoline while in the retailers' hands and prior to its sale to consumer-purchasers. The committee recognized that retailers could not pass on to the consumer-purchasers the already satisfied gasoline tax so far as gasoline that had evaporated was concerned. The recommendation, though it was not favorably acted on, simply recognized it was fair to refund or make an allowance to the retail dealers, though the tax incidence was not on them, based on gasoline which through evaporation would never be used on the highways but on which the tax had been paid by the producer.

Concerning these refund or allowance provisions under the Federal Act, Martin also argues that the persons eligible for the refund or allowance, that is, farmers, transit companies and other off-highway gasoline users, are unconstitutionally discriminated against in violation of the uniformity provision of our constitution and the due-process and equal-

protection clauses of the United States constitution. The reasoning is that they pay the Illinois retailers' occupation tax or use tax on the basis of a price which includes the Federal gasoline tax which is refundable to them. Thus, these taxpayers pay a higher Illinois tax than other gasoline users, as in their case the Illinois tax is not imposed on the basis of the true and ultimate price to them. We cannot, however, entertain this argument. Martin does not claim to be qualified for a Federal refund as a farmer, transit company or other off-highway user. Thus, even if a discrimination were to be assumed, it does not affect Martin and it has no standing to raise this issue. (*Hornof* v. *Kroger Co.*, 35 Ill. 2d 125.) Nor need we, therefore, consider the Department's response to Martin's argument that this constitutional issue has been waived, as Martin failed to raise it in the circuit court.

The second major contention of Martin is that even if it should be found that the legal incidence of the tax is on the producer rather than on the consumer, sales made to consumers by one who is a producer-retailer, as is Martin, should be distinguished from sales made by one who is simply a retailer, and the sales by the producer-retailer should be exempt from the retailers' occupation tax. The ground for this argument is that in the case of a sale by a producer-retailer to the consumer the liability for the Federal gasoline tax as a producer and the liability for the retailers' occupation tax as a retailer arise at the moment of sale. Because they are simultaneous taxes, one should not be included in computing the other. Martin points out decisions from two other jurisdictions which have taken this position and notes that the rule of the Department from 1935 to 1962 permitted producer-retailers to exclude the Federal gasoline tax in determining the amount of the retailers' occupation tax.

In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 and *Standard Oil Co.* v. *State Tax Commissioner*, 71 N.D.

146, 299 N.W. 447, Michigan and North Dakota adopted the position Martin would have us take. As expressed by the Supreme Court of Michigan the rationale of this position is that since the two taxes attach simultaneously, the Federal gasoline tax should not be considered a part of the sales price but as a fund which is payable by the producer to the Federal government.

The Department's response is that if Martin's argument is accepted it would result in the Federal tax of four cents per gallon being included in the computation of the Illinois tax on sales by retailers who are not also producers and excluded in the case of producer-retailers. This would typically result in the cost of gasoline to a consumer who purchases from a non-producer retailer being greater than to one who purchases from a producer-retailer and would economically discriminate against non-producer retailers. It would violate, argues the Department, the Illinois constitution and the equal protection clause of the United States constitution.

The retailers' occupation tax in Illinois is imposed on a retailer's "gross receipts" (Ill. Rev. Stat. 1969, ch. 120, par. 441). "Gross receipts" are the "total selling price" or the "amount of such sales." (Ill. Rev. State. 1969, ch. 120 par. 440.) "Selling price" or "amount of sale" is defined as the "consideration for a sale ***." Ill. Rev. Stat. 1969, ch. 120, par. 440.

The question therefore is whether when the producer-retailer passes on the cost to him of the Federal gasoline tax in the form of a higher price to the consumer, the amount by which the price is thus raised to compensate the producer-retailer can be said to be part of the consideration he receives upon the sale of the gasoline.

In *Fischman & Sons, Inc.* v. *Department of Revenue*, 12 Ill. 2d 253, this court held that a retail seller of packaged liquor could not deduct, for purposes of the retailers' occu-

pation tax, the amount of increase in the purchase price caused by the imposition of the Federal and Illinois liquor taxes. It is true that the liability for those taxes did not arise simultaneously with the retailers' occupation tax, but we cannot see a legal distinction arising from that circumstance. The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is no different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his "gross receipts" or the "consideration" he receives for his gasoline. No reason has been given by Martin why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none.

The incidence of the tax was not on the consumer as it is under the Motor Fuel Tax Act. (*American Oil Co. v. Mahin*, No. 43376.) We consider that the rule of the Department which permitted producer-retailers as Martin to deduct the Federal gasoline tax from its gross receipts on sales to retail customers represented an erroneous interpretation of the Retailers' Occupation Tax Act. The superseding and existing rule prohibiting the deduction correctly interprets the statute. One effect of this rule is to place Martin as a producer-retailer in the same position, so far as the retailers' occupation tax is concerned, as that occupied by retailers who are not also producers.

It is undeniable that weight should be given a contemporaneous construction placed on an ambiguous statute by the officers charged with the duty of administering it. We do not

believe the statute is ambiguous. Even if ambiguity is assumed, the rule obviously cannot be invoked to prevent those officers from rectifying an erroneous construction. An administrative construction of a statute is not binding if it is erroneous. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315, 77 L.Ed. 796, 807; *Superior Coal Co.* v. *Department of Revenue,* 4 Ill. 2d 459, 468.

Our conclusion that an increase in the sales price caused by the Federal gasoline tax is not deductible by any retailer, including a producer-retailer, from the gross receipts makes it unnecessary for us to consider whether a preference given a producer-retailer in this regard would be constitutional.

For the reasons given, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

APPENDIX B

STATES WHICH IMPOSE TAXES MEASURED BY GROSS RECEIPTS AND WHICH DO NOT STATUTORILY EXCLUDE FEDERAL GASOLINE TAX FROM THE STATE TAX BASE

Alaska	Business License Tax; *Alaska Stat.*, §§ 43.70.010 to 43.70.120.
California	Sales and Use Tax; *Cal. Revenue & Taxation Code*, §§ 6001 to 7176. Exemption of gasoline sales contained in *Cal. Revenue & Taxation Code*, §§ 6051, 6201 ends on July 1, 1972. *S.B.* 325, ch. 1400 (November 4, 1971).
Delaware	Merchants' License Tax; *Del. Code Ann.*, tit. 30, §§ 2901 to 2906.
Georgia	Sales and Use Tax; *Ga. Code Ann.*, §§ 92-3401a to 92-3451a.
Hawaii	Gross Income and Use Tax; *Hawaii Rev. Laws*, §§ 237-1 to 237-49; 238-1 to 238-16.
Illinois	Retailer's Occupation Tax and Use Tax; *Ill. Rev. Stat*, ch. 120, §§ 440 to 453; 439.1 to 439.31.
Indiana	Gross Income Tax; *Ind. Ann. Stat.*, §§ 64-2601 to 64-2635.
	Sales and Use Tax; *Ind. Ann. Stat.*, §§ 64-2651 to 64-2668.

Iowa	Retail Sales Tax and Use Tax; *Iowa Code*, §§ 422.42 to 422.59; 423.1 to 423.25.
Michigan	Sales and Use Tax; *Mich. Comp. Laws*, §§ 205.51 to 205.78; 205.91 to 205.111.
Mississippi	Sales and Use Tax; *Miss. Code Ann.*, §§ 10103 to 10139; 10146-01 to 10146-16.
New Jersey	Unincorporated Business Tax; *N. J. Rev. Stat.*, §§ 54:11B-1 to 11B-23.
New York	Sales and Use Tax; *N. Y. Tax Law*, §§ 1101 to 1148.
West Virginia	Business and Occupation Tax; *W. Va. Code Ann.*, §§ 11-13-1 to 11-13-25.

APPENDIX C

STATES IN WHICH LOCAL GOVERNMENTAL UNITS CAN IMPOSE TAXES MEASURED BY GROSS RECEIPTS AND WHICH DO NOT STATUTORILY EXCLUDE FEDERAL GASOLINE TAX FROM THE TAX BASE

A. Generally

Alaska	*Alaska Stat.*, § 29.10.357.
California	*Cal. Revenue & Taxation Code*, §§ 7200 to 7209. Parallels state exemptions. Exemption of gasoline sales ends statewide on July 1, 1972. *Cal. S.B.* 325, ch. 1400 (Nov. 4, 1971).
Delaware	Charter.
Florida	Charter.
Illinois	*Ill. Rev. Stat*, ch. 24, § 8-11-1; *Ill. Rev. Stat.* ch. 34, § 409.1.
Nevada	*Nev. Rev. Stat.*, § 266.600.
New York	*N. Y. Tax Law*, § 1210.
Oregon	Municipalities with population of 9,000 to 10,500 only, *Ore. Rev. Stat.*, § 221.430.
Pennsylvania	*Pa. Stat.*, ch. 53, § 6902. State pre-emption problem.
South Carolina	*S. C. Code Ann.*, §§ 47-173, 47-173.1, 47-271, 47-272, 47-273, 47-274.
Tennessee	*Bus. Tax Act, Tenn. Laws* 1971, ch. 387.
Utah	*Utah Code Ann.*, § 10-8-80.
Virginia	*Va. Code Ann.*, § 58-441-49.
West Virginia	*W. Va. Code Ann.*, § 8-13-5.

B. Specific Units of Local Government

Los Angeles	Sales and Use Tax; *Los Angeles, Calif. Ordinance* 90,360. Parallels state exemptions; exemption of motor fuel ends statewide on July 1, 1972. *Cal. S.B.* 325, ch. 1400 (Nov. 4, 1971).
Los Angeles	License Tax; *Los Angeles, Calif., Ordinance* 115,044.
New York City	Sales and Use Tax; *N. Y. C. Special City Taxes*, ch. 46, tit. A, Sales and Related Taxes.
New York City	Unincorporated Business Tax; *N. Y. C. Admin. Code*, ch. 46, tit. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-845

MARTIN OIL SERVICE, INC.,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),
Attorney for Respondents.

FRANCIS T. CROWE,
MORRIS S. BROMBERG,
DONALD S. CARNOW,
Assistant Attorneys General,
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF FACTS

Respondent disagrees in part with the Petitioner's Statement of Facts. It specifically disagrees with those self-serving portions relating to alleged requirements that Martin had to remit a federal gasoline tax on each gallon of gasoline *sold at retail*. Petitioner quotes 26 U.S.C. 4081(a) as creating that obligation. However, that section states:

> ". . . there is hereby imposed on gasoline sold by the producer or importer thereof, or any producer of gasoline, a tax of 4¢ per gallon."

The obvious purpose of Martin's insertion of the words "at retail" is to create an impression with this Court that Martin is in a special category because it is both a producer and a retailer. This is essentially a distinction without a difference, and was clearly found to be without merit by Mr. Justice Ward of the Illinois Supreme Court.

Martin further states (at page 4 of its Petition) that between 1935 and 1962, by reason of Regulations of the Department of Revenue of the State of Illinois, a retailer who was also a producer could deduct from gross receipts an amount equal to the gasoline tax that the retailer remitted to the Federal government; and, that on January 10, 1962, the Illinois Department of Revenue reversed its administrative construction. It should be noted that the Illinois Supreme Court held that the previous construction by the Department of Revenue was erroneous. (Petitioner's Brief and Appendix, 9-10).

A further omission of fact appears at page 5 of the Petitioner's Brief, where Martin states that:

> ". . . thereafter (it) ceased deducting federal gasoline tax in determining its 'gross receipts' . . . (and) paid the state tax as so computed into a protest fund."

Omitted is the finding of fact by the Illinois Supreme Court that the regulations were changed in 1962 and that "Martin undertook to persuade the Department to recall its amendment and while this effort was being made, that is, until April, 1964, *Martin itself absorbed the increased retailers' occupation tax* on all sales made through its retail outlets."

ARGUMENT

I.

THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT LACK INDEPENDENT AND ADEQUATE STATE SUBSTANTIVE GROUNDS TO SUPPORT THE JUDGMENT; NOR IS THERE A SUBSTANTIAL FEDERAL QUESTION PRESENTED IN THE DECISION.

The law is clear that this Court will decline to review state court judgments which rest on independent and adequate state substantive grounds, even where those judgments also decide federal questions. *Henry* v. *Mississippi*, 397 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564 (1965). Additionally, this Court has gone so far as to say that it will not review a state court decision resting on an adequate and independent non-federal ground, even though a state court may have summoned to its support an erroneous view of the federal law. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1944). The decision of the Illinois Supreme Court clearly rested on independent state grounds. Petitioners, however, attempt to raise an artificial issue when it alleges that the "non-federal ground is so interwoven with the other as not to be an independent matter."

Petitioners raised an issue of incidence of taxation which was foreclosed by the Illinois Supreme Court in 1934 in *People* v. *Werner*, 364 Ill. 594, 5 N.E. 2d 238 (1934). It is respectfully submitted that the incidence of federal taxation is irrelevant to the construction of the Illinois Retailers Occupation Tax, Sections 440, et seq. (Ch. 120, Sec. 440, et seq., Ill. Rev. Stat.) In reach-

ing its decision the Illinois Supreme Court clearly relied on *Fischmann & Sons* v. *Department of Revenue*, 12 Ill. 2d 253; 146 N.E. 2d 512 (1966), a case involving the construction of the Illinois Retailers Occupation Tax where the taxpayer was claiming a deduction for the Federal liquor tax.

Further it is clear that in Illinois no credit is permissible for Federal excise taxes. *Fischmann, supra; People* v. *Werner, supra.*

The discussion of the statutory construction of 26 U.S.C. 4081 et seq. is pure *judicial dicta.* The issue was raised by the Petitioner in its brief and argued orally but, as can be seen from the language of the decision, the discussion was not necessary for the disposition of the case. It is clear that the Illinois Supreme Court can rest upon *Fischmann, supra,* and *Werner, supra.*

It is a settled proposition of law in reviewing a judgment or decision of a state court that the record must show that the judgment rested alone upon the disposition of the federal question. *Marsh* v. *Nichols S. & Co.*, 140 U.S. 344 (1891); and further that the decision thereof was controlling in the disposition of the case. *Citizens Bank* v. *Board of Liquidation*, 98 U.S. 140, 25 L. Ed. 114 (1879). Additionally, jurisdiction of this Court cannot be founded upon a mere surmise that the decision of the state court rested upon the interpretation of a federal statute. *Lynch* v. *N. Y.*, 293 U.S. 592 (1934). It is submitted that Petitioner's request for Certiorari is insufficient on this ground.

Moreover, the Petition is insufficient on the ground that it raises an insubstantial and frivolous federal question, assuming that the discussion of 26 U.S.C. 4081 in the Illinois decision is something other than *judicial dicta.*

Seaboard Air Line R. Co. v. *Watson,* 287 U.S. 286 (1932). The alleged federal question presented by Martin is plainly insubstantial as its unsoundness results from previous decisions of this Court and is thus foreclosed.

California Water Serv. Co. v. *Redding,* 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865; *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *C. L. Merrick Co.,* 254 U.S. 376, 65 L. Ed. 312, 41 S. Ct. 142; *Leonard* v. *Vicksburg, S. & P. R. Co.,* 198 U.S. 416, 49 L. Ed. 1108, 25 S. Ct. 750.

As will be developed, the federal question presented by Martin is foreclosed by *Lash's Products Co.* v. *U. S.,* 278 U.S. 175, 49 S. Ct. 100, 73 L. Ed. 251, aff'g. 64 Ct. Cl, 252, and *Biddle* v. *Commissioner,* 302 U.S. 573, 581; 58 S. Ct. 379 (1937).

II.

THE INCIDENCE OF TAXATION FOR THE EXCISE TAX ON GASOLINE IS ON THE PRODUCER.

The statutory scheme of Federal excise taxes may be described generally as a heterogeneous group of taxes imposed on a variety of articles, products, services, facilities and transactions. They comprise a selective system of taxation and not a broad general plan of taxation. By selective system of taxation is meant that certain enumerated articles and services are taxed, and then only certain specific designated articles, services, products and transactions within the categories. For example, automobile equipment is taxed, however, the tax does not attach to all vehicles, but only to those of the highway type. 26 U.S.C. 4061, and Rev. Rul. 57-440 (CB 1957-2, 721). Also the tax does not attach to all electric, oil and gas appliances, but only to those of the household type. 26 U.S.C. 4121 and Rev. Rul. 58-49 (CB 1958-2, 788).

Likewise it is clear that only gasoline used on the highways was intended to be taxed. In effecting an element of tax on non-highway uses, a statutory scheme of refunds was implemented to non-highway users such as farmers. 26 U.S.C. 6421. Because farmers are entitled to refunds, however, it does not necessarily follow that Congress intended the gasoline tax to be a consumer tax. Rather Treasury Regulation 40.4081-1(a) manifests a clear intent that the liability be imposed upon the producer or distributor. The tax is on the producer, for the transaction, and not on the consumer.

III.

THE STATUTORY SCHEME OF CHAPTER 32 OF THE INTERNAL REVENUE CODE OF 1954 AND THE TREASURY REGULATION THEREUNDER CLEARLY REVEAL THAT THE TAX WAS NOT TO BE A CONSUMER TAX.

In an effort to ascertain the intent of Congress, the entire statutory scheme of federal excise taxation must necessarily be analysed and evaluated. In that scheme, the sections raised by Martin as comprising its federal statutory question are made part of Subchapter A of Chapter 32 of the Internal Revenue Code of 1954 (26 U.S.C. 4081-4084). Interestingly, Chapter 32 is entitled "Manufacturers Excise Taxes." These provisions are modified by Section 4216(b) of subchapter F of Chapter 32 (26 U.S.C. 4216(b)). Therein, Congress acknowledges that many manufacturers sell their products to wholesalers who, in turn, sell to the consumer. In many other cases, however, a manufacturer will sell directly to a retailer, and in others he (the manufacturer) will sell directly to

the consumer. Congress recognized that if a manufacturer sells directly to the consumer he would necessarily charge a greater sales price than if he sold directly to the wholesaler. Since the manufacturer-producer's taxes are based on selling price, the result would be that a higher tax would be imposed on sales to the consumer than would be imposed on sales to wholesalers. This, Congress thought, would create arbitrary price discrimination against the manufacturer-producer, and price him out of the market. Therefore, Congress, recognizing the desirability of imposing excise taxes on a uniform basis, enacted certain specific provisions designed to limit the taxes that could be imposed on the manufacturer and thus protect the manufacturer. Martin is a beneficiary of this relief.

Also, under Section 4216, the Treasury promulgated certain interpretative regulations regarding the computation of the offset credit allowable to gasoline manufacturers. These regulations were promulgated as Reg. 44 (1944) 314.0 et seq. These regulations are important inasmuch as they set out the regulatory scheme for the imposition of the gasoline taxes and the Treasury Department's interpretation of the statutes. These regulations appear under the 1954 Code as follows:

> Reg. 44 (1944), Sec. 314.0. **Scope of regulations.**—These regulations apply to the excise taxes imposed by Chapter 29, Subchapter A, of the [1939] Internal Revenue Code [now Chapter 32, Subchapter A] as amended, on sales of gasoline, lubricating oil, and matches. They deal with the determination of tax liability, the computation of the tax, the manner of its application, the collection and return of tax, the imposition of penalties, and related matters.
>
> * * * * * *

Reg. 44 (1944), Sec. 314.2. **Effective period.**—The taxes on the sale of gasoline, lubricating oils, and matches became effective under Title IV of the Revenue Act of 1932 on June 21, 1932. The applicable provisions of the Revenue Act of 1932 were superseded, effective March 1, 1939, by provisions of the [1939] Internal Revenue Code. [Reg. 44 (1944), Sec. 314.2.]

* * * * *

[¶1804] Reg. 44 (1944), Sec. 314.3. **Liability for tax.**—(a) Each manufacturer, producer, or importer is liable for tax on any sale, lease, or use of a taxable article, whether such sale, lease, or use is made directly or through an agent, except as otherwise provided. See Subpart C and sections 314.5, 314.32, 314.33, 314.42, and 314.43.

(b) The tax attaches upon sale or use by the manufacturer irrespective of when the article was manufactured, produced, or imported.

(c) In the case of a sale on credit, it is immaterial whether or not the purchase price is actually collected. [Reg. 44 (1944), Sec. 314.3.]

* * * * *

[¶1805] Reg. 44 (1944), Sec. 314.4. **When tax attaches.**—(a) In general, the tax attaches when the title to the article sold passes from the manufacturer to a purchaser.

(b) When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the sale is made govern in determining when title passes. Generally, title passes upon delivery of the article to the purchaser or to a carrier for the purchaser.

(c) Where a manufacturer consigns articles to a dealer, retaining ownership in them until they are disposed of by the dealer, title does not pass and

> the tax does not attach until sale by the dealer. Likewise, where the relationship between a manufacturer and a dealer is that of principal and agent, title passes upon sale by the dealer, and tax thereupon attaches. [Reg. 44 (1944), Sec. 314.4.]

The 1939 Code Regulations were made applicable to the 1954 I.R.C. by T. D. 6091.

It is clear that the Treasury places the liability for the tax on the producer. No language is used in the regulations in any way to reflect that the Treasury views Martin or other producers as mere collecting agents for the U. S. Government. As pointed out by Mr. Justice Ward in his opinion "the statute does not impose any liability on the purchaser consumer if the gasoline tax is not remitted by the producer."

Furthermore, to support this line of thought, Congress has made it quite clear that the gasoline tax is assessable against the producer-retailer and not the consumer. 26 U.S.C. 6501. In the event that false returns are filed by a taxpayer-manufacturer, the Treasury Department has taken the view that the tax may be assessed at any time. Rev. Proc. 59-366 (CB 1952-2, 418). It would seem that if Congress intended the gasoline tax to be a consumer tax, the Internal Revenue Code would contain provisions for assessing the tax against the taxpayer-consumer. But it does not.

IV.

THE COURTS HAVE HELD THAT TAXES IMPOSED BY CHAPTER 32 OF THE INTERNAL REVENUE CODE OF 1954 ARE PRODUCER TAXES.

Martin, nevertheless, would have this Court believe that the incidence of taxation rests upon the consumer in

citing *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 146; 299 N.W. 477 (1941) and *Standard Oil* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937). As pointed out by Mr. Justice Ward of the Illinois Supreme Court, neither of these cases involves the incidence of taxation.

This Court need not rely upon mere conjecture as to the intent of Congress. The law is clear that the Manufacturers Excise Tax is imposed on the manufacturer alone. In *Lash's Products Co.* v. *U. S.*, 278 U.S. 175, 176, Mr. Justice Holmes characterized the excise tax imposed on "soft drinks" as:

> "This is a suit to recover the amount of certain taxes paid under the Revenue Act of 1918 (Act of February 24, 1919, chap. 18, § 628, 40 Stat. at L. 1057, 1116). By § 628 there is imposed on 'soft drinks, sold by the manufacturer, . . . in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold.' This tax was paid by the petitioner, calculated at 10 per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it [176] paid the 10 per cent tax, and it contends that in this way it passed the tax on, and that the true price of the goods was the sum received less the amount of the tax. *The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Heckman & Co.* v. *L. S. Dawes & Son Co.*, 56 App. D.C. 213, 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains." (Emphasis added).

Likewise, in *Shearer* v. *Commissioner of Internal Revenue*, 48 F. 2d 552, 554, 555, Mr. Justice Learned Hand, in in-

terpreting another provision of what is now Chapter 32 of the Internal Revenue Code of 1954, stated:

> "*As to the second point, the motor tax is imposed upon the dealer, not the purchaser,* Section 900 (42 Stat. 291) levies an excise upon 'the following articles sold . . . by the manufacturer,' and if it had been theoretically open to argument whether the dealer or the buyer was the subject of the tax, the question was set at rest by *Lash's Products Co.* v. *U. S.*, 178 U.S. 175, 49 S. Ct. 100, 73 L. Ed. 251. In that case a similar tax under section 628 of the Act of 1918 (40 Stat. 1116) was held to be imposed upon the dealer, and to be part of the purchase price upon which the percentage should be computed, though this results in taxing the tax itself when it has been 'passed on' to the customer." (Emphasis added).

Another case on *all fours* with the instant matter is *Sun Oil Co.* v. *Gross Income Tax Commission of Indiana*, 149 N.E. 2d 115, 58 USTC, Par. 15145, 238 Ind. 111 (1958).

Petitioner, however, would suggest to this Court that *Tax Review Board of Philadelphia* v. *Esso Standard Division of Humble Oil and Ref. Co.*, 424 Penn. 355, 227 A. 2d 657, correctly states the law.

It is respectfully submitted that the petitioner and the Supreme Court of Pennsylvania both indulge in *post hoc ergo proctor hoc* reasoning. Because the petitioner and others have the ability to pass the tax on to the consumer, it does not necessarily follow that the gas tax was intended by Congress to be a consumer tax. Federal cases and common sense point to the opposite conclusion.

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No. 71-845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MARTIN OIL SERVICE, INC.,

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAYER, BROWN & PLATT

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON
231 South La Salle Street
Chicago, Illinois 60604

February 11, 1972

BORG/CHICAGO, U.S.A.

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Martin recognizes that it is not customary to file a reply brief in support of a Petition for a Writ of Certiorari. However, in view of the confusion engendered by Respondent's brief in opposition thereto, Martin feels compelled to submit this short statement of clarification.

At the outset, issue must be taken with Respondent's assertions that Martin has misstated and omitted "material" facts in its Petition to this Court (Resp. Br., pp. 1-2). In each instance, Respondent is unjustified in its assertion, and is erroneous in treating the matters discussed as if they were relevant to the issue before this Court.

Specific note should be taken of Respondent's prime objection to Martin's statement that it is required to remit Federal gasoline tax on gasoline it sells *at retail*. Since almost all of Martin's sales of gasoline are "at retail", and since this is the point in time when the Federal gasoline tax must be remitted to the Internal Revenue Service, it is difficult to comprehend how Martin's statement was misleading, or what else Martin could have said.

Respondent's legal arguments also bear very little relation to the substance of this litigation. As indicated in its Petition, Martin is asking this Court to construe a Federal statute so as to reconcile conflicting interpretations heretofore reached by a number of state supreme courts. The sole issue presented is whether the legal incidence of the Federal gasoline tax is on the consumer or the manufacturer. For it is only after that Federal question is resolved that the state courts can determine whether Federal gasoline tax proceeds must be included in "gross receipts" for state sales, use, or gross income tax purposes. The arguments raised by Respondent in its brief do not help resolve that issue.

For example, at pp. 3-5 of its brief, Respondent argues that this case is not governed by the legal incidence of the Federal gasoline tax, but that the decision below rested on independent state law issues. This simply contradicts the Illinois Supreme Court opinion, which reveals, unequivocally, that that Court treated the Federal question raised here as decisive, and based its decision exclusively on its construction of the Federal gasoline tax statute. In citing *People* v. *Werner*, 364 Ill. 594, 5 N.E.2d 238 (1936), the Illinois Supreme Court was not resting its decision on an independent state ground, as Respondent suggests, but was reaffirming its earlier holding that "the legal incidence of the Federal

gasoline tax rested on the producer". (App. 3.) The Illinois court's decision was founded on its interpretation of the Federal statute involved, and that interpretation, which conflicts with decisions rendered by other state supreme courts and which affects taxes in at least 21 other states, should be reviewed by this Court.

Moreover, the cases cited by Respondent at pp. 4-5 of its brief are inapposite. Those cases* all held that no substantial Federal question was presented when the issues raised had been foreclosed by prior decisions of this Court. However, the only prior decisions discussed by Respondent, *Lash's Products Co.* v. *United States*, 278 U.S. 175 (1929) and *Shearer* v. *Commissioner of Internal Revenue*, 48 F.2d 552 (2d Cir., 1931), quite obviously, did not deal with the Federal tax on gasoline and are not controlling here as Respondent suggests. The courts in those two cases did not have to consider the legislative history and specific provisions of the unique tax statutes at issue here, particularly those provisions which provide for a direct refund of taxes to farmers and other off-highway users.**

Respondent's reliance on Treasury Regulations 44, Section 314.0, *et seq.*, at pp. 7-9 of its brief, is similarly mis-

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* *California Water Serv. Co.* v. *Redding*, 304 U.S. 252 (1938); *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *C. L. Merrick Co.*, 254 U.S. 376 (1920); *Leonard* v. *Vicksburg, S. & P. R. Co.*, 198 U.S. 416 (1905).

** *Biddle* v. *Commissioner*, 302 U.S. 573 (1938), cited by Respondent at p. 5 of its brief, is also irrelevant inasmuch as the issue decided there was whether an American shareholder of an English company was entitled to a foreign tax credit for the standard British income tax paid by the English corporation.

placed. All those Regulations do is restate what is already obvious from Sections 4081 and 4082 of Title 28, U.S.C., that the Federal gasoline tax attaches upon sale or use of gasoline by the producer, and that the producer is required to remit the tax proceeds to the Internal Revenue Service.* Nowhere do the Regulations answer the critical question posed in this Petition: on whom does the legal incidence of the Federal gasoline tax fall? Martin has conceded throughout this litigation that the producer has been selected by Congress to be the administrative conduit through whom the tax is to be remitted, and that the tax must be remitted whenever gasoline is used by a producer or sold by him to a non-producer. However, in view of the fact that refunds are made by the Federal government directly to consumers, and upon consideration of the legislative commentary declaring the Federal gasoline levy to be a "user" tax, Martin contends that the producer is merely an agent for collection of the tax while

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* Revenue Ruling 59-366, 1959-2 Cum. Bull. 418, cited by Respondent at p. 9 of its brief, is also inapplicable. When correctly read, that Ruling merely prescribes the date upon which a Quarterly Federal Excise Tax Return will be deemed filed for statute of limitations purposes. Clearly, it has no effect whatsoever on the legal incidence of the Federal gasoline tax.

the consumer bears the legal incidence thereof. This argument is in no way affected by the Treasury Regulations cited by Respondent.

Respectfully submitted,

MARK H. BERENS
WM. BRUCE HOFF, JR.
WILLIAM A. GORDON

231 South La Salle Street
Chicago, Illinois 60604
(312) 782-0600

Counsel for Petitioner

MAYER, BROWN & PLATT
Of Counsel